

Appendix D: Legal Focus Group, September 11, 2002
Wisconsin Department of Transportation
Hill Farms State Transportation Building
Madison, Wisconsin

THEMES, ISSUES, OPINIONS AND PERCEPTIONS

The following summarizes the themes, issues, opinions and perceptions of the Legal Focus Group session conducted on September 11, 2002. This discussion focused on the use of passive alcohol sensor devices in traffic enforcement. Members of the focus group were selected on the basis of their interest in passive alcohol sensors in relation to the legal profession or as a representative of varying legal professions in Wisconsin. All participants were asked a series of questions pertaining to legal and policy issues regarding the devices. The survey questions and a list of the participants can be found following these statements.

It is important to stress that no attempt was made to achieve a consensus on the questions or to “take a vote” to determine majority opinion. The responses listed below represent the observations, experiences, and opinions of the participants.

NOTE: Three of the nine legal professionals represented at the focus session also responded to an additional question submitted after the session concluded.

4th Amendment Concerns / Searches

- *The use of passive alcohol sensors does not violate the 4th Amendment of the US Constitution, which protects citizens from unlawful searches.*

Still some are concerned whether the use of the device and its technology constitutes a “search.”

Since a person’s breath is offered in full view of the public, there is no expectation of privacy, thus the use of the passive alcohol sensor is not a search.

A person’s breath may be considered as “waste” and thus open applicable to government monitoring and regulation for the general welfare of the public.

- *Recent *Kyllo v. US* case (US Supreme Court) suggests that since the US Supreme Court ruled that thermal imaging when used at a remote location to sense an illegal marijuana growing operation was considered a search, the use of a passive alcohol sensor may also be considered a search*

Yet the *Kyllo* case involved a private residence and not a vehicle that has a diminished expectation of privacy (i.e. automobile exception rule)

Upon rolling down the window of the vehicle, the driver has removed her/his expectation of privacy.

Thermal imaging is used from a remote location whereas the use of the passive alcohol sensor for an OWI traffic stop generally requires the officer to be standing next to a vehicle.

- *Probable cause is important to Wisconsin law and needs to be the primary element for an OWI traffic stop before the use of a passive alcohol sensor.*
- *Is there a “precondition” at an OWI traffic stop that must exist before a passive alcohol sensor is used?*
- *Guidelines for passive alcohol sensor use should be created for law enforcement agencies*

The rules, preconditions and/or policies on use of the devices can guide law enforcement officers as to what circumstance and what stage of the traffic stop process the device is to be used.

Suspect should be given reasonable notice by the law enforcement officer that the device is being used.

Use of the device should be at the discretion of the individual officer.

Appropriate / Inappropriate Uses of Passive Alcohol Sensors

- *The opportunities for use of the device by law enforcement officers are very limited.*
- *Suggested that passive alcohol sensors would be used only 1 out of every 30 OWI traffic stops.*
- *Infrequent use of the devices will thus have little impact in terms of reducing the number of OWI convictions or no impact at all.*
- *Even the infrequent use of the devices does not invalidate their use; 1 in 30 stops is still significant for combating OWI*
- *Just one of many tools available to law enforcement. Arrests for OWI do not depend upon only one alcohol test. Other techniques are recognized by the courts as tools for law enforcement (e.g. Horizontal Gaze Nystagmus – HGN).*
- *Benefits of Passive Alcohol Sensors:*

Most helpful in cases regarding absolute sobriety.

Assist law enforcement officers suffering a cold or other olfactory limitations.

Assist in crash investigations.

Public deterrent when used as part of a public education campaign.

Law enforcement officers already have the authority to smell alcohol, so use of passive alcohol sensor as a deterrent is “silly” public concept.

- ***Concern over potential abuses of passive alcohol sensors:***

Device may be able to detect alcohol that had been spilled by a passenger or from an intoxicated passenger; alcohol incorrectly attributed to the driver instead of the passenger.

If the officer cannot see, smell or hear that something is wrong at the traffic stop, why is the officer using a tool to look for something?

Used by law enforcement as an “excuse” to stop people without probable cause simply to gain access to the motorist and further question the motorist.

A passive alcohol sensor/flashlight thrust into a violator’s face may be intimidating. Differing opinions on how far the device must be held away from the face of the violator (i.e. 3” – 10” depending upon the type of device used).

Traffic stops can be regarded as “traumatic events” and the use of the passive alcohol sensor may make them even more traumatic.

Making a sense “easier” (i.e. passive alcohol sensor enhances smell) is an uncomfortable thought.

- ***How do passive alcohol sensors compare to other law enforcement technologies?***

The public already has to endure “intrusive” technology designed to protect them, such as airport x-ray machines and speed detecting radar.

Passive alcohol sensors are only an extension of the officer’s senses, similar to the use of binoculars.

Passive alcohol sensors are really no more intrusive than other technologies.

Public is accustomed to and even expects law enforcement to use technology at traffic stops.

Since September 11, 2001, the public is more open to increased security measures and law enforcement use of tools.

A major difference between a passive alcohol sensor and other technology is that a passive alcohol sensor is sensing alcohol, which is a *legal* substance (as long as the amount is at the legal limit) in today's society and that is where the intrusion lies. Whereas, other technology is often looking for illegal items such as bombs or drugs. That introduces the concept of absolute sobriety as the minimum BAC level for drivers.

Possible to create an atmosphere of absolute sobriety if legal alcohol is given the same status as other illegal substances.

- What happens during the traffic stop after the passive alcohol sensor is used? Will the officer require the suspect to take more tests?
- Would it be legal for the officer not to require the suspect to take more test?
- Any traffic stop constitutes an inconvenience; the passive alcohol sensor is just another inconvenience.

Policy Concerns related to Passive Alcohol Sensor Use

- *Passive alcohol sensors should not be banned from use in Wisconsin, but the decision of their use should be left up to individual law enforcement agencies and communities.*

Banning passive alcohol sensors would not serve a constructive purpose.

Some communities and law enforcement agencies are more aggressive in traffic enforcement and have larger budgets for technological purchases.

Passive alcohol sensors may enable "selective enforcement" where a wealthy community could target minorities or poor residents.

- *Public may have a perception that the devices are intrusive even though they are considered constitutional.*

The public includes not only persons who are interested in reducing alcohol-related crashes, but also persons who are interested in protecting individual privacy rights.

- *Since statistics indicate that there is a downward trend in the number of alcohol-related deaths, is the passive alcohol sensor actually addressing a problem or should that problem be better defined.*

- Officer may have to predetermine if she/he will use the passive alcohol sensor only when she/he has a cold or at every stop.
- *A better definition of the problem of OWI may be necessary to better select the appropriate tools to address the problem rather than let technology determine the correct tools.*
- *Even with a decline in the number of alcohol-related deaths, each death is important to the individual families.*
- *The decline in alcohol-related deaths is not reflective of the technology used by law enforcement, but rather reflective of new laws, fines, court cases and other tools.*

Sobriety Checkpoints Are Not Legal In Wisconsin

- *Sobriety checkpoints in other states, such as Illinois, are tolerated by the general public because of a general concern with OWI and a desire to reduce alcohol-related crashes and deaths.*
- *The political climate in Wisconsin, including citizen concern with privacy, does not permit sobriety checkpoints in Wisconsin.*

Concerns related to OWI do not mean that the government should be given a “blank check” to invade someone’s privacy.

Privacy Concerns

- *The use of passive alcohol sensors may constitute an unreasonable search because, in the broader societal context, they represent one more tool in a broad continuum of tools used by law enforcement for conducting an investigation or for doing surveillance.*
- *Possibility of creating a “slippery slope” or “big brother” effect in which privacy rights are eroded over the long term as more technology is employed to enforce laws.*
- *General public is becoming increasingly concerned about privacy and not letting the government set precedents that can take away fundamental privacy rights.*
- *Technology has advanced beyond privacy laws.*
- *Passive alcohol sensors have limited usefulness and thus limited impact on privacy.*

Has Technology Gone Too Far?

- *Examples of law enforcement technologies going “too far” are requiring photo identification with fingerprints and swabbing for DNA samples.*
- *If passive alcohol sensors are considered too intrusive, it is not worth defending them in court.*
- *There is no real problem with the use of the passive alcohol sensors since they are not permitted as evidence in court.*
- *Technology is not pervasive if it is so expensive that it cannot be purchased and used by governments*

Passive alcohol sensors and the Courts

- *Law enforcement officers may not like having to defend passive alcohol sensors in court (as they currently do with Intoximeters and radar), since it is a non-evidentiary tool; may not be a problem.*
- *Use of the passive alcohol sensor in court simply gives defense attorneys one more point to argue.*
- *Credibility of the law enforcement officers may diminish if they need to use a tool to smell alcohol.*
- *No need to use passive alcohol sensors if officer already smelled alcohol. Defend why a passive alcohol sensor was not used.*
- *For prosecutors, passive alcohol sensors may be more trouble than they are worth.*
- *May have to create legislative language to categorize passive alcohol sensors similar to PBT's.*
- *Hard to defend variances of colors of passive alcohol sensor results in court.*

Cost/Benefit of Passive Alcohol Sensors

- *Passive alcohol sensors have minimal benefit related to the cost of purchase and training.*
- *Funds should be spent on other technologies that have already been proven to be effective in combating OWI.*

- *Though constitutionally permissible, passive alcohol sensors do not represent a “silver bullet” in the enforcement of OWI laws.*
- *Just one tool among many available for law enforcement.*

Training and Public Education

- *Adequate training for law enforcement officers on how and when to use passive alcohol sensors will determine their effectiveness.*
- *Law enforcement officers still must be able to use their discretion when enforcing OWI laws.*
- *Public needs as much education related to the passive alcohol sensor as do law enforcement officers.*

Final Comments

- *Passive alcohol sensors are not needed; they do not add to officers’ abilities.*
- *Money would be better spent on other tools or in other areas of law enforcement.*
- *Is the use of passive alcohol sensors important enough to defend them against concerns related to electronic intrusions?*
- *Gains with use of passive alcohol sensors are small when compared to cost*
- *Use of passive alcohol sensors must include officer training and public education*
- *Use of passive alcohol sensors should not permit law enforcement officers to become “lazy” or eliminate their use of discretion*
- *The devices are lawful and represent minimal intrusion*
- *Too much hassle, cost and questionable results to encourage implementation of passive alcohol sensors.*
- *Wisconsin’s political climate is not the same as other states that use passive alcohol sensors at sobriety checkpoints.*
- *Devices should not be banned but determination of use should be left up to individual law enforcement agencies and communities.*
- *Passive alcohol sensor should not be used because they compromise personal rights.*

NOTE: Legal Focus group participants were queried via mail to address an issue not discussed during the focus group session. The issue was stated: *If the passive alcohol sensor detects alcohol near an open bottle of intoxicants in the motor vehicle, but not visible to the law enforcement officer conducting or assisting the traffic stop, does this discovery of the open bottle still fall into the “plain view” doctrine?*

- It would not be in plain view because [the officer did] not see the bottle – I assume it was found only after a search pursuant to the sensor indicating the presence of alcohol. The plain view doctrine only “kicks in” for things that are seen without any kind of manipulation or search.
- I do not believe that a concealed container can properly be deemed in plain view when it is detected with such a sensory aid.
- It is unclear ...how plain view applies to the open container if the officer does not see it as set forth in the facts. If the container is found during a subsequent search as a search incident to arrest or perhaps even as consent search then there is no problem. Plain view doctrine does not apply. If the question is really what happens if an open container is subsequently located and that arguably the open container is what caused the passive alcohol sensor to alert the officer, I still don't see a problem as the officer would still have to conduct his investigation including making his own observations regarding signs of intoxication including field tests before an arrest is made...use of the passive alcohol sensor does not qualify as a search, and therefore, no constitutional questions arise.

LEGAL FOCUS GROUP

List of Participants

***Wednesday, September, 11th, 2002
12:30pm - 2:30pm
Hill Farms State Office Building, Room 551
State Patrol Headquarters
Madison***

1. Maureen Boyle, District Attorney, Walworth County
2. Barry Cohen, Defense Attorney, Elkhart Lake
3. Jacqueline Agee, John Marshall Law School student / PAS researcher
4. Nina Emerson, Director, Resource Center for Impaired Driving – UW Madison
5. Dave Perlman, Assistant Attorney General, Wisconsin Department of Justice
6. Dee Dee Watson, Public Defender, State Public Defender's Office
7. James Gramling, Municipal Judge, City of Milwaukee
8. Mike Vaughan, Attorney - Murphy/Desmond, Madison
9. Carol Doeppers, Privacy Consultant (formerly of the WI ACLU), Madison

Observers: Tim McClain (WisDOT-Bureau of Transportation Safety), Dennis Hughes (WisDOT-Bureau of Transportation Safety), Lorelee Brumund (WisDOT-Division of State Patrol), Gene Tremelling (WisDOT-DSP/Chemical Test Section), Jane Maney (WisDOT-DSP/Chemical Test Section), Susan Hackworthy (WisDOT-DSP/Chemical Test Section), Hector Gonzalez-Velez (WisDOT- Office of General Counsel).

Guest/non-participant (invited by Mike Vaughn): Kelly McDowell (Miller Brewing Company)

Legal Focus Group Questions

Most searches of motor vehicles and drivers are made without a warrant. A warrant less search does not violate the 4th Amendment if the search falls within an exception to the warrant requirement. Warrant less searches of motor vehicles and drivers may be authorized under a number of 4th Amendment exceptions including the automobile exception, the consent exception, the *plain view* exception, the investigatory exception, and the search incident to arrest exception.

1. Does the use of a passive alcohol sensor during the course of a valid traffic stop fall within any of these exceptions?
2. Does the use of a passive alcohol sensor during the course of a valid traffic stop—when used to identify the presence of alcohol on/around a passenger or other areas of the vehicle—fall within any of the 4th Amendment exceptions for a warrant-less search?
- 2A. Does that exception apply to an open intoxicant in the vehicle?

The *Sense Enhancement Doctrine* permits law enforcement officers to use their senses, or enhancement of their senses, to identify a possible violation and/or to locate an item considered to be in plain view.

3. Is the use of a passive alcohol sensor simply another tool, similar to drug sniffing dogs or x-ray machines at airports, to which the *Sense Enhancement Doctrine* is applicable?

Law enforcement officers currently have the ability to use preliminary breath test devices (PBT's), which require a subject to blow into a mouthpiece to test for the presence of alcohol. During this procedure, the subject is aware that the officer is requesting a breath sample for testing. In comparison, not all passive alcohol sensors are so obvious and may not be readily identifiable by the subject as a breath-testing device.

4. This inability to easily identify the passive alcohol sensor as a breath testing device -- Of what concern—if any—would that be to the courts?
- 4A. Follow-up question: Is the use of a less obvious breath testing device such as some of the passive alcohol sensors currently on the market a good practice/policy for law enforcement?

5. Of what value are passive alcohol sensors to prosecutors in the conviction of OWI violations?

- 5A. Could passive alcohol sensors have a significant impact in terms of arrest and prosecution?
- 6. Do you think passive alcohol sensors should be used for traffic enforcement in Wisconsin for OWI enforcement?
- 7. Is there anything we have missed or is there anything anyone would like to add to the discussion?